No. 12-10

IN THE

Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly determined that Respondents are likely to succeed on their claim that the First Amendment prohibits the government from requiring grantees, as a condition of receiving federal funds, to adopt and express as their own the government's viewpoint on an issue of public debate, while also prohibiting grantees from expressing any views or undertaking any activity, even with private funds, "inconsistent with" the government's viewpoint.

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BRIEF IN OPPOSITION

STATEMENT

This case presents a challenge to a single provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7601. That provision, as implemented by the government, requires recipients of Leadership Act funds to adopt a policy explicitly opposing prostitution and prohibits them from expressing any views or engaging in any activities the government deems "inconsistent" with the policy. This Policy Requirement, as it is known, applies to grantees in their entirety, including their privately funded speech and programs.

Respondents challenged the Policy Requirement as a violation of their First Amendment right to free speech. The Second Circuit affirmed a preliminary injunction enjoining enforcement of the Policy Requirement, concluding that Respondents were likely to prevail on the merits of their First Amendment claims because the Policy Requirement "falls well beyond what the Supreme Court ... [has] upheld as permissible conditions on the receipt of government funds." Pet. App. 25a. The court of appeals reasoned that—although the Policy Requirement was enacted under Congress's spending power—it likely violates the First Amendment because it forces Respondents to adopt and espouse as their own the government's viewpoint, and applies to Respondents in their entirety, even restricting private speech and activities undertaken with purely private funds.

The Second Circuit's interlocutory decision is correct, does not create a "square circuit conflict," and is consistent with the decisions of this Court. The petition should therefore be denied.

A. The Leadership Act And The Policy Requirement

In 2003, Congress enacted the Leadership Act to fight the HIV/AIDS pandemic. The statute's stated purpose is "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases." 22 U.S.C. § 7603.

The Leadership Act seeks to fulfill that purpose by preventing new infections, treating HIV-positive persons, and caring for people whose lives have been affected by HIV/AIDS. The statute devotes billions of

dollars to a variety of activities designed to achieve these goals. The statute makes no reference to a messaging campaign. *See infra* II.4.b.

The Leadership Act places a host of conditions on the *use* of federal funds.[1] All of these conditions are imposed on the funds themselves and thus have no impact beyond the scope of federally funded programs. In contrast, the Policy Requirement imposes conditions not on federal funds, but rather on the grantee organizations that receive federal funds. The Policy Requirement states that Leadership Act funds shall not be available to "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). This provision requires grantees to adopt and espouse as their own a policy explicitly opposing prostitution.

Notably, the Leadership Act expressly exempts some grantees from the Policy Requirement, which "shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization ("WHO"), the International AIDS Vaccine Initiative, or to any United Nations agency." 22 U.S.C. § 7631(f). Indeed, the WHO and UNAIDS, recipients of Leadership Act funds, have "taken a public position at odds with the Policy Requirement, recognizing the reduction of penalties for prostitution as a best practice in the fight against HIV/AIDS." Pet. App. 33a.

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[1] *See, e.g.*, 22 U.S.C. § 7631(e) (barring use of government funds "to promote or advocate the legalization or practice of prostitution or sex trafficking"); 22 U.S.C. § 7655(f) ("not more than 7 percent of the amount of a grant received under this section ... [may be] used for administrative expenses").

In April 2010, Petitioners United States Agency for International Development ("USAID") and Department of Health and Human Services ("HHS") issued implementing regulations that further prohibit any part of a grantee organization—even privately funded parts—from "engag[ing] in activities that are inconsistent with their opposition to prostitution and sex trafficking." 75 Fed. Reg. 18,760 (Apr. 13, 2010) (the "Guidelines"). The Guidelines do not define the phrase "inconsistent with their opposition to prostitution."

The Policy Requirement applies to each grantee organization *in its entirety*. The entire grantee organization—encompassing all of its parts and programs—must affirmatively adopt and espouse as its own the government's viewpoint on prostitution. The Policy Requirement thus controls not only the organization's federally funded speech and activities, but also its *privately funded* speech and activities. In fact, because other separate Leadership Act provisions and regulations—which Respondents do not challenge—already control the use of government funds,[2] the Policy Requirement's impact falls squarely on privately funded speech and activities.

B. The Respondents

In the Leadership Act, Congress recognized that government partnerships with nongovernmental organizations ("NGOs"), such as Respondents, are "critical to the success of the international community's efforts to combat HIV/AIDS and other infectious diseas-

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[2] *See, e.g.*, 22 U.S.C. § 7631(e) (barring use of federal funds "to promote or advocate the legalization or practice of prostitution or sex trafficking").

es around the globe." 22 U.S.C. § 7621(a)(4). Accordingly, the Leadership Act seeks to expand "public-private partnerships" and to "include multisectoral approaches" to the fight against HIV/AIDS. 22 U.S.C. § 7603(a)(5), (a)(9), (4).

Respondents are U.S.-based NGOs that run a wide variety of public health programs as part of the global fight against HIV/AIDS.[3]

Respondent Pathfinder is a reproductive health organization that operates in more than twenty countries and uses Leadership Act funds to prevent HIV/AIDS and treat and care for its victims. As of the filing of this action, Pathfinder ran programs that: prevent mother-to-child HIV transmission in Kenya; improve treatment of the disease in Bangladesh by aiding local NGOs to become "technically and managerially self-sufficient in the provision of essential health services"; expand home-based care programs for HIV victims in Tanzania; and increase psychosocial and peer counseling services in Botswana.

Respondent InterAction comprises the largest alliance of U.S.-based international development and humanitarian NGOs, many of which promote public health. For example, InterAction member Cooperative for Assistance and Relief Everywhere, Inc. ("CARE") uses Leadership Act funds to treat and care for AIDS orphans and other children affected by or infected with HIV in Africa.

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[3] In addition to receiving U.S. government funding under the Leadership Act, Respondents also receive significant funding from private donors, foreign governments such as Sweden, Canada, and the Netherlands, and international organizations such as the World Bank and the United Nations.

As of the filing of this action, Respondent AOSI used Leadership Act funds to run a program in Central Asia to stop the spread of HIV/AIDS, for example, "[b]y preventing injection drug use."[4]

C. The Policy Requirement's Effect On Respondents' Work To Fight HIV/AIDS

Successful efforts to fight HIV/AIDS often involve organizing and working cooperatively with marginalized "high-risk" groups, such as prostitutes. For example, the WHO and the United Nations have said that, in some regions, the most effective HIV prevention efforts require advocating changes to laws and policies to prevent prostitutes from going "underground" and avoiding treatment and care. CAJA 61-64.

Respondents' work in fighting HIV/AIDS includes engaging in various outreach efforts and cooperative activities with these marginalized groups. This work includes Respondent CARE's sex worker peer education programs in Bangladesh and India; Respondent Pathfinder's efforts to organize prostitutes in India so they can collectively agree to engage in HIV prevention; and Respondent Pathfinder's outreach to sex workers in bars and clubs to provide public health information and health services. UNAIDS and the WHO have praised some of these programs as best practices for prevention strategies. *See, e.g.*, CAJA 882 ¶ 23.

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[4] As of the filing of this action, Respondent Global Health Council ("GHC") was the largest alliance of organizations dedicated to international public health; it temporarily suspended its operations in June 2012, with the hope of resuming [its] work in the future." http://www.globalhealth.org (last accessed Dec. 12, 2012).

In order for this work to succeed, Respondents generally avoid taking policy positions or making statements that are likely to offend host nations, partner organizations, or groups that Respondents seek to influence and help. Respondents recognize the health risks and other harms associated with prostitution. They also believe, however, based on experience that adopting a policy that explicitly opposes prostitution would jeopardize Respondents' effectiveness in working with high-risk groups to fight HIV/AIDS. *See, e.g.*, CAJA 882, 884 ¶¶ 23, 26; CAJA 847-48 ¶ 25. Because the Policy Requirement bars any speech or activities the government deems "inconsistent with" an anti-prostitution policy, it effectively prevents Respondents from using even their own *private* funds to work cooperatively with prostitutes or advocate legal and policy changes—or even discuss such issues. As a result, the Policy Requirement impedes Respondents' efforts to conduct privately funded HIV/AIDS prevention work in accordance with widely recognized best public health practices. Similarly, the Policy Requirement impairs Respondents' ability to use private funds to discuss their HIV/AIDS work and research at public health conferences, in publications, and on websites.

D. Procedural Background

The government did not enforce the Policy Requirement against U.S.-based organizations for more than a year after the Act went into effect. At that time, the Department of Justice's Office of Legal Counsel ("OLC") opined in a written memorandum that applying the Policy Requirement to U.S. organizations would be unconstitutional. *See* CAJA 143 n.10, 155-156. The government litigated for years in an effort to keep the OLC memorandum from becoming public, and finally disclosed it in November 2012 only in response to a

court order issued two months earlier. *See Brennan Ctr. for Justice* v. *Department of Justice*, 697 F.3d 184 (2d Cir. 2012). Notably, OLC concludes in the memorandum—albeit tentatively—that the Policy Requirement's "organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs [] *cannot be constitutionally applied to U.S. organizations*." App. 1a (emphasis supplied). In 2005, for reasons that have never been publicly explained, OLC issued a second opinion in which it changed its view; shortly thereafter, the government began enforcing the Policy Requirement against U.S.-based organizations.

AOSI and Pathfinder sued Petitioners in 2005 to enjoin the Policy Requirement because it violates their First Amendment rights. Respondents do not challenge any restrictions the government places on the use of Leadership Act funds; rather, they challenge only the Policy Requirement and implementing regulations that compel them to adopt and espouse *as their own* a certain viewpoint, and to prohibit "inconsistent" speech and activities, even if undertaken with private funds outside the scope of any federally-funded program.

In May 2006, the district court entered a preliminary injunction, holding that the Policy Requirement likely violates the First Amendment. Pet. App. 112a-219a. The government appealed in August 2006. After the parties briefed the appeal, the government effectively mooted its own appeal and avoided review by announcing for the first time at oral argument in June 2007 that it intended to issue guidelines implementing the Policy Requirement. *AOSI* v. *USAID*, 254 F. App'x 843, 846 (2d Cir. 2007). Those guidelines, issued the next month in July 2007, allowed grantees to affili-

ate with separate organizations that could engage in "activities inconsistent with the recipient's opposition to ... prostitution," but they required "objective integrity and independence" from such affiliates and failed to define activities "inconsistent" with an opposition to prostitution. *See* 45 C.F.R. § 89.3. In August 2007, the Second Circuit ordered a second round of briefing, and in November of that year remanded in light of the guidelines. *Id.*

In August 2008, the district court ruled on remand that the guidelines did not cure the Policy Requirement's constitutional defects because "the clause requiring [Respondents] to adopt the government's view regarding the legalization of prostitution remains intact," and the guidelines imposed significant burdens on Respondents. Pet. App. 10a (internal quotation marks omitted). Granting a motion to amend the complaint, the district court also extended injunctive relief to two new plaintiffs, Respondents GHC and InterAction.

In October 2008, the government appealed again. In January 2009, just five days before a change in administrations, the government filed its brief in the Second Circuit. With its own appeal pending, the government again issued new regulations, which took effect on Inauguration Day in January 2009. In July 2009, on the eve of the deadline for Respondents' brief to the Second Circuit, the government again announced its intent to revise the regulations. Days later, the parties stipulated to the withdrawal of the government's appeal subject to reinstatement by January 2010.

In January 2010, the government reinstated its appeal. In April 2010, with the government's own appeal pending again, HHS and USAID issued almost identical amended regulations. The new Guidelines, 45

C.F.R. § 89, permit grantees to affiliate with other entities that do not receive federal funds, but they do not cure the constitutional infirmities identified by the district court. Grantees are still required to adopt and espouse as their own the government's policy opposing prostitution. And they are still prohibited from saying or doing anything the government deems "inconsistent" with that viewpoint. Pet. App. 297a. The parties briefed and argued the appeal in 2010.

In July 2011, the Second Circuit affirmed the preliminary injunction, holding that the Policy Requirement violates the First Amendment by compelling funding recipients to adopt the required policy and espouse the government's viewpoint as a condition of receiving federal funding. Pet. App. 36a. The court found that the Policy Requirement "pushes considerably further" than any Spending Clause condition previously held by this Court to be constitutional. Pet. App. 25a.

The Second Circuit rejected the government's arguments under *Rust* v. *Sullivan*, 500 U.S. 173 (1991). The court held that the Policy Requirement goes "well beyond" the limitations upheld in *Rust*, "because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own," whereas the funding condition in *Rust* did not require a funding recipient to represent as his own any opinion it did not actually hold. Pet. App. 31a.

The Second Circuit also held that the Policy Requirement could not be justified under the government speech doctrine. The Second Circuit ruled that "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS, as well as tuberculosis and malaria" and could not be "recast" as "an anti-prostitution messaging campaign." Pet. App. 33a. The court rejected the gov-

ernment's argument that anti-prostitution policy statements are "integral" to the Leadership Act's goal, ruling that such a contention was "undermined by the fact that the government has chosen to fund high-profile, global organizations"—the WHO, the United Nations, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the International AIDS Vaccine Initiative—"that remain free to express openly a contrary policy, or no policy at all." Pet. App. 33a-34a.

Additionally, the court held that the Guidelines, which permit funding recipients to set up physically and financially separate affiliates, do nothing to address the fact that the Policy Requirement compels speech and discriminates based on viewpoint.

Judge Straub dissented, asserting that the Leadership Act was designed to convey a government message and should be upheld under *Rust*. Pet. App. 37a-96a. But the dissent mistakenly assumed that the Policy Requirement is "cabined to the federal subsidy program" (Pet. App. 55a-56a) and therefore "does not restrict [Respondents'] First Amendment speech outside of the scope of the Leadership Act program" (Pet. App. 77a).

The Second Circuit denied the government's petition for rehearing en banc, with three judges dissenting. Pet. App. 98a-111a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO "SQUARE CIRCUIT CONFLICT"

The government argues that the decision below presents a "square circuit conflict" with *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007) ("*DKT*"). The *DKT* court, however, assessed the constitutionality of the Policy Requirement in the context of a hypothetical

set of facts that never came to pass. There is no reason to believe that the D.C. Circuit, if faced with the same facts and legal questions in this case, would have resolved the question presented here any differently from the Second Circuit.

1. The factual predicates for the decisions of the Second Circuit and D.C. Circuit differ in two significant ways. First, DKT challenged the Policy Requirement before the government promulgated the Guidelines. Importantly, the government represented to the D.C. Circuit at oral argument that grantees would be able to express their privately funded views through subsidiaries that would not be subject to the Policy Requirement. The government maintained that grantees could "just spin[] off a subsidiary corporation," and "[a]ll of [DKT's] complaints could be solved through a corporate reorganization." *DKT*, 477 F.3d at 763 n.4.

The D.C. Circuit based a significant portion of its opinion on the government's vague assurances regarding a hypothetical affiliate scheme that never actually materialized. The *DKT* court acknowledged that *Rust* "stressed" the constitutional significance of the fact that the restriction at issue there applied only to federally funded *programs* and not to entire grantees. *See* 477 F.3d at 763. Yet, the D.C. Circuit found that, given the close nature of relationships between parent and subsidiary companies, and given the purported ease with which a grantee could establish such a subsidiary, the grantee and subsidiary were tantamount to separate *programs* within a larger, unified entity, and thus the Policy Requirement did not run afoul of *Rust* in that respect. *See id.* The DKT court's reasoning on this point was explicitly, and solely, based on its mistaken assumptions about the contours of the government's hypothetical separation requirements. *Id.*

As we now know, those hypothetical separation requirements never came to pass. Instead, the government issued separation requirements that are different in kind and considerably more burdensome. The actual Guidelines do not say that the Policy Requirement applies only to federally funded programs. To the contrary, the Guidelines still require recipients to adopt entity-wide policies opposing prostitution. In addition, they demand that a grantee must be separate "to the extent practicable" from an undefined "affiliated organization that engages in activities inconsistent with the recipient's opposition to the practice[] of prostitution." CASPA 188-189, 203-204. Whether a grantee and affiliate are sufficiently "separate" depends on a vague, case-by-case balancing of five non-exclusive factors: separate personnel, legal status, physical facilities, accounts, and records. *Id.*

These factors impose significant burdens on Respondents, which operate in many foreign countries with disparate legal regimes. Often, the countries in which Respondents operate have significant hurdles to establishing and operating NGOs, such as complex registration requirements and restrictive visa approvals, which makes the creation and operation of an affiliate organization extremely burdensome in some cases, and nearly impossible in others. *See, e.g.*, CASPA 175; CAJA 719-720 ¶¶ 46-49; CAJA 850-851 ¶¶ 33-34; CAJA 887-889 ¶¶ 32-36; CAJA 899-900 ¶¶ 33-34; CAJA 906-928 ¶¶ 12-67. It is indisputable that the burdens imposed by the Guidelines are far more onerous than the hypothetical guidelines in *DKT* that supposedly would have permitted grantees to "just spin off a subsidiary," *DKT*, 477 F.3d at 763. *See AOSI* v. *USAID*, 570 F. Supp. 2d 533, 548 (S.D.N.Y. 2008) ("[T]he D.C. Circuit was not aware of the restrictions placed on recipients,

such that compliance with the Guidelines is not as straightforward as the simple organization of a subsidiary, which normally does not entail the separations imposed by the Guidelines.").

In contrast, the Second Circuit's decision was based on the actual Guidelines, which make clear that, contrary to *DKT*'s assumption, the Policy Requirement's restrictions apply to entire grantees, and any qualifying affiliate would have to be a wholly separate entity—not merely a separate program within a grantee organization. (This Court made clear in *Rust* that this is a constitutionally significant distinction. 500 U.S. at 196-197.) These were not the facts or circumstances presented to the D.C. Circuit, which considered whether a funding condition is constitutional when it restricts *federally funded programs* (which hypothetically could be loosely separated from privately funded programs). The Second Circuit, however, considered whether the same funding condition is constitutional when it binds entire grantees, *including their privately funded programs, speech, and activities* (which must be strictly separated from affiliated entities). Arriving at different answers to these different questions does not create a circuit conflict.

Second, the *DKT* court accepted the government's assertion—made many years ago—that, without the Policy Requirement, "[t]he effectiveness of the government's viewpoint-based [Leadership Act] program would be substantially undermined, and the government's message confused." 477 F.3d at 762-763 (internal quotation marks omitted). Yet the preliminary injunction entered by the district court in this case has now been in place six years and the government has presented no evidence that Leadership Act programs have been "undermined" or that the government's mes-

sage has been "confused." The Second Circuit did not base its assessment of the government's justification of the Policy Requirement on the hypothetical risk of harm that the government presented to the D.C. Circuit. Rather, the Second Circuit assessed the constitutionality of the Policy Requirement based on the record before it, which was devoid of evidence of harm to Leadership Act programs during the six-year period in which the injunction has been in place.

2. The government also asserts a broader division between the Second Circuit's holding and other circuits that "have found that affiliation guidelines cure any constitutional difficulty, because they allow funding recipients to cabin the effects of a restriction on speech to the scope of the federally funded program." Pet. 27. This argument fails for two reasons.

First, the Guidelines here do not "cabin" the Policy Requirement's effects to the scope of federally funded programs. If an organization receives Leadership Act funds, that entire organization must explicitly adopt and espouse as its own an anti-prostitution policy, and all of the organization's speech and activities, whether federally or privately funded, are subject to the Policy Requirement. *See infra* Statement.A. Similarly, the entire organization is prohibited from doing or saying anything the government deems to be inconsistent with its policy. The Guidelines do nothing to "cabin" these effects to the scope of federal funds or even federally funded programs; rather, the Policy Requirement continues to apply wholesale to the recipient organization. The Guidelines merely allow the recipient organization to affiliate with a separate organization that would not be subject to the requirement. (Of course, affiliation with a separate organization does nothing to address the compelled speech and viewpoint discrimination vis-

ited on the funding recipient.) This is not the same as cases where restrictions have applied only to a single federally funded program within a recipient organization, but not to the other programs within the organization. *See Rust*, 500 U.S. at 196. The Guidelines accordingly do not have the same ameliorating effect as guidelines have had in the cases the government cites.

Second, the government cites no case where another circuit has held that affiliation guidelines permit the government to compel privately funded speech as a condition of receiving federal funds. The government's cited cases stand only for the proposition that, when the government tells an organization *not* to say or do something through the federally funded program, the First Amendment may be satisfied by provisions that allow the affected organization to say or do that thing through another program or subsidiary (providing that the *programs* are sufficiently separate). *See Planned Parenthood, Inc.* v. *Dempsey*, 167 F.3d 458 (8th Cir. 1999); *Legal Aid Soc'y of Hawaii* v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998). The Second Circuit properly distinguished this scenario. The Policy Requirement compels recipient organizations to adopt and espouse as their own the government's anti-prostitution policy; allowing those organizations to create an affiliate that is not bound by the Policy Requirement in no way remedies that compulsion. Pet. App. 35a-36a.[5]

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[5] In any event, this Court has recently held that allowing an affiliate to speak is no panacea for a restriction on an organization's First Amendment rights. *See Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010).

II. THE SECOND CIRCUIT'S DECISION IS CORRECT

1. In resolving this case, the Second Circuit correctly applied this Court's precedents. The Court has repeatedly stated that Congress may not condition the receipt of public funds on the relinquishment of First Amendment rights.[6] Yet, that is exactly what the Policy Requirement does.

The Second Circuit correctly concluded that the Policy Requirement compels speech, is viewpoint discriminatory, and prohibits any speech or activities that the government deems to be "inconsistent" with the government's viewpoint, making it likely to violate the First Amendment on multiple grounds. The mere fact that these First Amendment violations stem from an exercise of Congress's spending power does not save the Policy Requirement. *See, e.g.*, Pet. App. 18a ("Congress' Spending power, while broad, is not unlimited, and other constitutional provisions may provide an independent bar to the conditional grant of federal funds."). Congress cannot do with the spending power what it is expressly prohibited from doing with the leg-

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[6] *See, e.g., Rumsfeld* v. *Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit" (quoting *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003))); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

islative power. *See Rumsfeld* v. *Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("*FAIR*").

2. As a preliminary matter, the Second Circuit correctly determined that the Policy Requirement should be subjected to heightened scrutiny. Pet. App. 29a. This level of scrutiny applies because the Policy Requirement compels speech and is viewpoint discriminatory, and thus raises the most serious First Amendment concerns. Pet. App. 26a-27a.

This Court has traditionally applied heightened scrutiny when reviewing laws that threaten core First Amendment freedoms. *See, e.g., Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 526-527 (1977) ("Statutes that trench on fundamental liberties ... are not entitled to the same presumption of constitutionality we normally accord legislation" but rather "must be subjected to the most searching kind of judicial scrutiny"). Paramount among those core freedoms is the right to choose whether to speak, and when speaking, what to say. *See, e.g., Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all"). For that reason, laws compelling speech have long been subject to heightened scrutiny. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) ("We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest" and therefore "have required that the subordinating interests of the State must survive exacting scrutiny."); *Knox* v. *SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not ... compel the endorsement of ideas that it approves" and if it does, such regulations "are subject to exacting First Amendment scrutiny").

The same is true of viewpoint discriminatory schemes. *See, e.g., Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 66 (1983) ("In light of the fact that viewpoint discrimination implicates core First Amendment values, the ... policy can be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (internal quotation marks omitted)); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 118 (1991) (holding government regulations that "impose content-based burdens on speech" must be "necessary to serve a compelling state interest and [ ] narrowly drawn to achieve that end" (internal quotation marks omitted)).

Thus, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), this Court applied heightened scrutiny to invalidate a regulation barring editorializing by television stations that receive federal funds, *id.* at 380, 402, even though that spending power regulation neither compelled speech nor discriminated based on viewpoint. *Id.* at 371 n.7. At least as stringent a standard is warranted here, where the Policy Requirement is far more offensive to Respondents' First Amendment rights. *See also Rust*, 500 U.S. at 195 n.4 (applying heightened scrutiny to a funding condition that applied only to federally funded programs and that did not compel speech). Moreover, the government has identified no case—and Respondents know of none—where this Court has applied anything less than heightened scrutiny to any funding condition analogous to the Policy Requirement.

3. The Second Circuit's determination that the Policy Requirement likely fails heightened scrutiny is also correct, for at least three reasons.

a. First, by compelling speech and discriminating based on viewpoint, the Policy Requirement violates a long line of First Amendment authority in this Court. The Second Circuit was right to recognize that the First Amendment generally does not permit the government to compel speech. "If there is any fixed star in our constitutional constellation, it is that no official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]" *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Indeed, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *FAIR*, 547 U.S. at 61.

This Court has found affirmative compulsion of speech to be more troubling than an affirmative compulsion of silence, which itself can violate the First Amendment. *Barnette*, 319 U.S. at 633 ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); *Wooley*, 430 U.S. at 715 (1977) (finding that "[c]ompelling [an] affirmative act ... involved a more serious infringement upon personal liberties than" compelling a "passive act").[7] The government cites no case, and Respondents are not aware of any, where this Court has upheld a funding condition that affirmatively compelled grantees to take an organization-wide pledge by adopting and

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[7] Contrary to the government's contention that the Second Circuit improperly relied on these cases (Pet. 21) the Second Circuit quite appropriately drew from these cases and others "the underlying principle that the First Amendment does not look fondly on attempts by the government," such as the Policy Requirement, "to affirmatively require speech" (Pet. App. 26a n.3. (Second Circuit panel opinion)).

espousing as their own the government's policy viewpoint.

The Second Circuit also correctly recognized that the Policy Requirement discriminates based on viewpoint, a trait that separately "offend[]s the First Amendment." Pet. App. 27a (citing *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster*, 502 U.S. at 116); *see also Simon & Schuster*, 502 U.S. at 118 (viewpoint-based restrictions "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace" and thus "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government").

Indeed, when this Court has upheld challenged Spending Clause enactments, it has emphasized the absence of compelled speech and viewpoint discrimination. In upholding the funding condition in *Rust*, for example, the Court relied on the fact that "nothing in [the regulation] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. Similarly, in *FAIR*, the Court explained that the Solomon Amendment did not run afoul of the unconstitutional conditions doctrine because the law "does not dictate the content of the speech at all.... There is nothing in this case approaching a Government-mandated pledge or motto that the [grantee] must endorse." 547 U.S. at 62.[8]

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[8] All four dissenting Justices in *League of Women Voters* made clear that, in their view, the government's scheme there passed constitutional muster because—unlike the Policy Requirement—it did *not* involve viewpoint discrimination. 468 U.S. at 407 (Rehnquist, C.J., dissenting) ("Congress' prohibition is strictly

b. Second, the Policy Requirement compels a grantee, as a condition of federal funding, to conform even its private speech and activities to the government's viewpoint. The Policy Requirement thus falls well outside the limits this Court has set to ensure that funding conditions do not violate First Amendment rights.

The Policy Requirement forces grantees in their entirety to adopt and espouse as their own the government's anti-prostitution policy, and it prohibits them from saying or doing anything "inconsistent" with that policy, even when spending their own private funds. Yet, in *Rust*, on which the government heavily relies in its petition, this Court went to great pains to explain that the regulatory scheme at issue was constitutional because it required grantees to give up abortion-related speech *only* within the government-funded program or project. 500 U.S. at 196 (holding that a federal funding requirement did not "condition the receipt of a benefit ... on the relinquishment of a constitutional right" because "[t]itle X expressly distinguishes between a Title X *grantee* and a Title X *project*."). Additionally, the condition in *Rust* permitted abortion-related speech by grantees, so long as such speech was undertaken only in the context of the grantees' privately funded programs. *Id.* at 199 n.5 ("recipient[s] remain free to use private, non-Title X funds to finance abortion-related activities"). Unlike the Policy Require-

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neutral. In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent."); *id.* at 413 (Stevens, J., dissenting) ("[O]f greatest significance for me, the statutory restriction is completely neutral in its operation—it prohibits all editorials without any distinction being drawn concerning ... the point of view that might be expressed.").

ment, the conditions in *Rust* "govern[ed] [only] the scope of the Title X *project's* activities, and [left] the grantee unfettered in its other activities." *Id.* at 198-199.

The government has said that the separation requirements imposed here were "modeled on" the separation requirements in *Rust*. Pet. 28 & n.7. But *Rust* did not involve compelled speech and the separation requirements there were designed to maintain adequate separation among *programs* within a grantee organization, 500 U.S. at 199 n.5, as opposed to the separation requirements here which are designed to maintain adequate separation among independent *entities or affiliates*. *See* 45 C.F.R. § 89.3. The Guidelines, therefore, are not analogous to the regulations in *Rust*; nor do they cure the fatal constitutional defects arising from the compelled speech and viewpoint discrimination aspects of the Policy Requirement.

Rust explicitly observed that the cases in which the Court had held program conditions unconstitutional were situations precisely like this one, "in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197; *see also* Pet. 28 (admitting that "the relevant question" in assessing a funding condition "is whether the condition 'effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally

funded program.'" (quoting *Rust*, 500 U.S. at 197) (alteration in original)).[9]

As a result of the entity-wide restriction, the Policy Requirement undeniably extends to, and dictates, speech and activities undertaken with a grantee's wholly private funds. This Court has made clear that speech restrictions on the use of purely private funds are likely to violate the First Amendment. *See, e.g., League of Women Voters*, 468 U.S. at 400 (holding unconstitutional a condition preventing publicly funded television stations from editorializing largely because the ban applied equally to private funds and, therefore, the "station is not able to segregate its activities according to the source of its funding" and "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity"); *see also Rust*, 500 U.S. at 200 (holding regulations constitutional because they were "limited to Title X funds; [and] the recipient remains free to use private, non-Title X funds to finance abortion-related activities").

c. Third, the Policy Requirement violates the First Amendment by precluding grantees from engaging in speech or activities the government deems to be "inconsistent with" the government's viewpoint. This abridgement of free speech rights on its own constitutes an independent violation of the First Amendment:

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[9] Tellingly, OLC relied on the Policy Requirement's imposition of "organization-wide restrictions" in its original opinion that the Policy Requirement is unconstitutional and cannot be applied to U.S.-based grantees. *See supra* Statement.D.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.... Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994); *see also First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-785 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue ... [The] power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (footnote omitted)); *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

Indeed, in *Legal Services Corp.* v. *Velazquez*, this Court found a First Amendment violation where a condition on federal funding, like the Policy Requirement,

suppressed private speech contrary to the government's viewpoint on an issue related to the relevant government program. 531 U.S. 533, 548-549 (2001) ("*Velazquez II*") ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

4. The government argues that the Second Circuit erred principally because it should have reviewed and upheld the Policy Requirement as "government speech." But, as the Second Circuit properly recognized, this case does not fit within the government speech doctrine. Pet. App. 18a (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). In any case, the government speech doctrine at most excuses viewpoint discrimination *only* with respect to *federally funded speech*—it does not permit the government to control the content of *privately funded speech*, much less to *compel* such private speech.

a. The government speech doctrine does not apply because the Policy Requirement does not purport to be a means to convey a message *on the government's behalf*; rather, it purports only to compel private speakers to adopt and espouse *as their own* the government's viewpoint.

This Court has recognized that "viewpoint-based funding decisions can be sustained in ... instances, like *Rust*, in which the government use[s] private speakers to transmit information *pertaining to its own program*." *Velazquez II*, 531 U.S. at 541 (internal quotation marks and citation omitted; emphasis added); *see also Rosenberger*, 515 U.S. at 833 ("[In *Rust*], the government did not create a program to encourage private

speech but instead used private speakers to transmit specific in-formation pertaining to its own program.").

Here, the government is not disbursing public funds to private entities to "convey a governmental message." Rather, the government requires that Leadership Act grantees convey information pertaining to their *own* beliefs. The Policy Requirement mandates that each organization adopt and espouse, as its own, an opposition to prostitution. This Court has never excused such compulsion under the "government speech" doctrine.

b. Further, contrary to the government's claim, the Leadership Act is not an anti-prostitution messaging statute. Rather, that characterization of the statute was first espoused by the government's lawyers in this liti-gation. Such tactics contravene this Court's admonition that the government "cannot recast a condition on fund-ing as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez II*, 531 U.S. at 547.

In any event, the government's attempted recasting of the Leadership Act is belied by the legislative history, statutory text, and practice. When the President pro-posed the legislation, when Congress debated it, and again when the President signed it, the Leadership Act was conceived of as an effort to fight the spread of HIV/AIDS through treatment, care, and prevention—not through anti-prostitution messaging.[10]

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[10] *See e.g.*, State of the Union Address, 149 Cong. Rec. H212, H213 (daily ed. Jan. 28, 2003) ("This comprehensive plan will prevent 7 million new AIDS infections, treat at least 2 million people with life-extending drugs, and provide humane care for millions of people suffering from AIDS and for children orphaned by AIDS.");

To achieve its purpose of "strengthen[ing] and enhanc[ing]" the United States response to the HIV/AIDS pandemic, 22 U.S.C. § 7603, the Leadership Act outlines a comprehensive strategy of actions, including:

- treatment initiatives that include improving healthcare delivery systems and medicine distribution, as well as placing U.S. healthcare professionals in areas of need, *see, e.g.*, 22 U.S.C. §§ 7631(a), (c), 7634(a), (b), (e), 7672;
- efforts to improve care for people affected by HIV/AIDS, including strengthening palliative care programs for debilitated patients, and bolstering support services for HIV-positive parents, their children, and orphans, *see, e.g.*, 22 U.S.C. §§ 7631(a), 7654, 7655; and
- prevention efforts that include undertaking vaccine research, reducing mother-to-child transmission, and encouraging a wide range of behavioral changes such as condom usage and testing, *see, e.g.*, 22 U.S.C. §§ 7611(a)(4), (8), 7631(a), 7652(a).

Taken together, the statutory purpose and this panoply of strategies (and others) make clear that the Leader-

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Remarks by the President on the Signing of H.R. 1298, the Leadership Act, 2003 U.S.C.C.A.N. 726, 729 (Mar. 27, 2003) (same); 149 Cong. Rec. S6415 (daily ed. May 15, 2003) (statement of Sen. Lugar) ("This plan would provide $15 billion over the next 5 years for AIDS care, treatment and prevention[.]"); 149 Cong. Rec. E1084 (daily ed. May 21, 2003) (statement of Rep. Schakowsky) ("This important legislation integrates prevention, care, and treatment.").

ship Act was designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words.

The government cites only 22 U.S.C. §§ 7601(23) and 7611(a)(12)—two of literally hundreds of provisions in the law—for its proposition that the statute is an anti-prostitution messaging statute. Those provisions cannot bear the weight the government places on them. Section 7601(23) says only that the "sex industry" is an "ad-ditional cause[] of and factor[] in the spread of the HIV/AIDS epidemic." Section 7611(a)(12), for its part, says that the President shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by," among other things, promoting abstinence, encouraging condom use, and promoting education and counseling. These provisions fall well short of establishing an anti-prostitution messaging campaign. Indeed, as the Second Circuit pointed out, the government's claim that anti-prostitution policy statements are "integral" to the Leadership Act's goals is "undermined by the fact that the government has chosen to fund high-profile, global organizations"—the WHO, the United Nations, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the International AIDS Vaccine Initiative—"that remain free to express openly a contrary policy, or no policy at all." Pet. App. 33a-34a.

In fact, the only express "messaging" component in the statute—added in the 2008 amendment—is unrelated to the anti-prostitution policy and directed at the U.S. Government, namely the Global AIDS Coordinator. *See* 22 U.S.C. § 7611(h).

c. In any event, even if this were a "government speech" case, the Policy Requirement fails to satisfy even that doctrine's more deferential review. As the

Second Circuit correctly recognized, "[t]he Policy Requirement goes well beyond the funding condition upheld in *Rust* because it compels [Respondents] to voice the government's viewpoint and to do so as if it were their own." Pet. App. 31a. Such a condition is not found in any of the "government speech" cases the government cites. Indeed, critical to this Court's upholding the funding condition at issue in *Rust* was that (1) grantees' employees were not required to represent as their own any opinion that they did not in fact hold; (2) grantees' employees were free to make clear that advice regarding abortion was beyond the scope of the federally funded program; and (3) grantees remained free to use private funds to finance abortion-related activities. *Rust*, 500 U.S. at 199 n.5, 200. In stark contrast, the Policy Requirement negates all three of those mitigating factors.

Further, as the Second Circuit properly held, "by compelling [Respondents] to affirmatively pledge their opposition to prostitution" (Pet. App. 32a), the government has stepped beyond any "legitimate and appropriate steps [needed] to ensure that its message is neither garbled nor distorted by [Respondents]." *Rosenberger*, 515 U.S. at 833. Even assuming that the Leadership Act contains a government message—which it does not—despite ample opportunity, the government has never introduced a single piece of evidence that its "message" has been harmed in any way by the district court's pre-liminary injunction, which has been in place for the last six years. This dearth of evidence shows the Policy Re-quirement is not, in fact, an "appropriate step[] [needed] to ensure that [the government's] message is neither garbled nor distorted." *Id.*

III. The Government's Additional Arguments Lack Merit

1. The government contends that "[t]he Second Circuit has [] exercised 'the grave power of annulling an Act of Congress,'" and has thereby "undermined the government's ability to implement the comprehensive approach chosen by Congress." Pet. 12. These claims are overblown. The Second Circuit did not annul an entire statute; nor did it strike down a substantial part of a statute. Instead, it preliminarily enjoined enforcement of a marginal provision of a lengthy statute that otherwise remains intact.

Moreover, as noted, the government has not offered any evidence that any federal program or message has been adversely affected by its inability to enforce the Policy Requirement during the last six years, whether against Respondents or against any of the organizations that Congress expressly exempted from the Policy Requirement.[11] Meanwhile, while the injunction has been in place, the government has touted the success of the Leadership Act,[12] and Respondents have continued to save lives, fight the spread of HIV/AIDS, teach best practices, provide public health services, and otherwise help the government fulfill the Act's goals.

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[11] Given the interlocutory nature of this appeal, if the government thinks it can make out a factual case of harm it would be free to do so on remand.

[12] *See, e.g.*, U.S. Dep't of State, *PEPFAR Blueprint* 2-3 (2012), *available at* http://www.pepfar.gov/documents/organization/201386.pdf.

To the extent the government is genuinely concerned that private organizations dedicated to the fight against HIV/AIDS will somehow undermine the government's anti-prostitution policy, the Leadership Act contains other safeguards to address those concerns. For example, a separate provision of the Leadership Act already prohibits grantees from spending government money on the promotion of prostitution. *See supra* Statement A n.2. Moreover, HHS and USAID impose a host of other conditions on government funds, which are designed to ensure that grantees act in furtherance of the policy objectives embodied in the Leadership Act.[13] There is accordingly no risk that denying review and leaving the preliminary injunction in place would somehow enable grantees to use federal funds to promote prostitution or to otherwise undermine the government's putative anti-prostitution policy.

2. Review is further unwarranted because this case is at an interlocutory stage and there has been no final decision on the merits. As the government has routinely argued, "[t]his Court 'generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.'" *See, e.g.*, U.S. BIO, *Legal Servs. for N.Y. City* v. *Legal Servs. Corp.* (No. 06-1308), at 7 (alterations in original) (quoting *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari)). Indeed, "[t]he interlocutory nature of the or-

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[13] *See, e.g.*, CAJA 444-446, 468-469 (cooperative agreement provisions giving agencies rights to inspect, monitor, and approve work plans, evaluation plans, and materials recipients prepare in order to ensure compliance with requirement that Leadership Act funds not be used to promote or advocate the legalization or practice of prostitution).

der 'alone furnishe[s] sufficient ground for the denial of the application.'" *Id.* (alterations in original) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). There is no reason to depart from that principle here.

3. Finally, review is particularly inappropriate because even if this Court were to grant and reverse on the First Amendment issue, the Policy Requirement would still be vulnerable to a vagueness challenge. Although the district court and the Second Circuit did not reach the issue, the requirement that grantees refrain from using their private funds in a manner that is "inconsistent" with a policy opposing prostitution fails to "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). The government has repeatedly refused to provide any further guidance on what speech or conduct the government deems as "inconsistent" with a policy opposing prostitution, leaving plaintiffs to guess at its meaning and risk significant civil liability and criminal penalties. *See* AOSI CA Br. 56 & n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

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